

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHNNY EDWARD MCMAHON,

Petitioner,

vs.

NEVEN, *et al.*,

Respondents.

No. 2:14-cv-00076-APG-CWH

ORDER

This habeas action by a Nevada state inmate comes before the Court on petitioner's application (Dkt. #1) to proceed *in forma pauperis*, motion (Dkt. #4) for appointment of counsel, motion (Dkt. #2) for a stay, and motion (Dkt. #3) to file additional pages in the petition, as well as for initial review under Rule 4 of the Rules Governing Section 2254 Cases.

Pauper Application

The pauper application is incomplete and will be denied without prejudice. Petitioner did not attach the financial documents required for an inmate to demonstrate pauper status. Under 28 U.S.C. § 1915(a)(2) and Local Rule LSR 1-2, a petitioner must attach both an inmate account statement for the past six months and a properly executed financial certificate with the pauper application. Petitioner did not attach an inmate account statement, and the financial certificate submitted apparently is from a state court form rather than the Court's required federal form.

The defects in the pauper application must be corrected before the action will proceed forward. However, as discussed further below, the Court finds that a provisional grant of

1 petitioner's motion for appointment of counsel is in the interests of justice, assuming financial
2 eligibility. The Court is proceeding with provisionally appointing counsel now so that counsel
3 will be able to proceed at this point to preserve petitioner's claims to the extent that, *arguendo*,
4 that may be accomplished.

5 However, petitioner still must timely: (a) pay the filing fee or submit a proper pauper
6 application; and (b) even if he pays the fee, submit sufficient financial materials – including a
7 current inmate account statement – confirming his financial eligibility for appointment of
8 counsel. If he fails to timely pay the filing fee or submit a proper pauper application, the action
9 will be dismissed without further advance notice. If he fails to confirm his financial eligibility,
10 the provisional appointment of counsel will not be confirmed.

11 With these qualifications, the Court turns to the motion for appointment of counsel.

12 ***Appointment of Counsel***

13 The Court finds, on the current record, that appointment of counsel is in the interests
14 of justice, considering, *inter alia*: (a) petitioner's current age of 62 combined with the
15 concurrent sentences imposed of twenty years to life, pursuant to which petitioner will not be
16 eligible for parole consideration prior to approximately the age of 76; (b) the number and
17 complexity of the potential procedural and substantive issues; and (c) at least the possibility
18 that some time may remain in the federal limitation period for the assertion of claims by
19 appointed habeas counsel in an amended petition without relation back concerns.¹

20 The motion for appointment of counsel therefore will be provisionally granted, subject
21 both to timely satisfaction of the filing fee requirement and confirmation of petitioner's financial
22 eligibility for appointment of counsel.

23 Petitioner should pay heed to the following, however. Federal habeas counsel is not
24 being appointed to act as a mere scrivener to restate and reassert each and every allegation
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27 ¹Neither the Court's order nor the appointment of counsel automatically tolls the federal limitation
28 period as to any claim. Petitioner at all times remains responsible for calculating the running of all applicable
limitation periods and timely seeking relief in an appropriate proceeding, without regard to any pleading or
other deadlines established herein.

1 and claim presented by petitioner *pro se*. The Court is not appointing counsel to pursue
2 claims or arguments that, in counsel's independent professional judgment, have no arguable
3 merit in a federal habeas corpus proceeding.

4 Petitioner thus should not assume that the Court will automatically appoint replacement
5 counsel in the event that petitioner and federal habeas counsel do not agree on what claims
6 or arguments should be presented. Appointed counsel's task is to pursue claims that counsel,
7 in his or her own independent professional judgment, believes that a court may find
8 meritorious, not to present claims that petitioner, who is not an attorney, believes to be
9 meritorious. Counsel is under absolutely no obligation to "follow petitioner's instructions" as
10 to what claims or arguments to present and how to present them. Accordingly, presenting
11 the Court with an alleged conflict between federal habeas counsel and petitioner based upon
12 a disagreement over how to pursue this case will not necessarily lead to an appointment of
13 replacement counsel. Subject to the circumstances presented at the time, the Court
14 potentially instead could find that the interests of justice no longer warrant the continued
15 appointment of any counsel, based upon the premise that if petitioner has such an allegedly
16 irreconcilable conflict with one competent attorney, the situation is not likely to be different with
17 another competent attorney.² Counsel, again, is not being appointed to pursue claims that
18 petitioner believes to be meritorious but, instead, is being appointed to pursue claims that, in
19 counsel's independent professional judgment, have arguable merit. Competent federal
20 habeas counsel thus possibly may not pursue all of the claims in the current pleading.

21 Moreover, the Court will not entertain *pro se* filings from petitioner when he is
22 represented by appointed counsel. Following the appointment of counsel, petitioner may
23 pursue this matter and communicate with the Court only through filings by counsel. Repeated
24 disregard of this admonition may result in the Court vacating the appointment of counsel,
25 depending upon the circumstances presented at the time.

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27 ²In contrast to the original state criminal proceedings, there is no Sixth Amendment right to counsel in
28 a federal habeas proceeding. Counsel will be appointed only for so long as the Court finds that appointment
of counsel is in the interests of justice.

1 Subject to these observations, the motion for appointment of counsel will be granted
2 provisionally.

3 ***Motion for a Stay***

4 The *pro se* motion for a stay will be denied without prejudice to the possible filing of a
5 counseled motion for appropriate relief following investigation and review of the matter, either
6 in conjunction with a counseled amended petition or otherwise.

7 ***Motion to File Additional Pages***

8 The motion to file additional pages with the original petition will be granted.

9 IT THEREFORE IS ORDERED that the application (Dkt. #1) to proceed *in forma*
10 *pauperis* is DENIED without prejudice. Petitioner shall have **thirty (30) days** within which to
11 either pay the \$5.00 filing fee or submit a properly-completed pauper application. This action
12 will be dismissed without further advance notice if he fails to do so.

13 IT FURTHER IS ORDERED that the Clerk of Court shall file the petition.

14 IT FURTHER IS ORDERED that the motion (Dkt. #4) for appointment of counsel is
15 provisionally GRANTED as per the remaining provisions below. The counsel appointed will
16 represent petitioner in all proceedings related to this matter, including any appeals or *certiorari*
17 proceedings, unless allowed to withdraw. The provisional grant of the motion is subject to
18 petitioner, within **thirty (30) days** of entry of this order: (a) satisfying the filing fee requirement,
19 as directed above; and (b) if a properly-completed pauper application is not filed, filing a
20 current inmate account statement confirming his financial eligibility under 18 U.S.C. § 3006A.

21 IT FURTHER IS ORDERED that the Federal Public Defender shall be provisionally
22 appointed as counsel and shall have **thirty (30) days** to undertake direct representation of
23 petitioner or to indicate an inability to do so. If the Federal Public Defender is unable to
24 represent petitioner, the Court then shall appoint alternate counsel. A deadline for the filing
25 of an amended petition and/or seeking other relief will be set after counsel has entered an
26 appearance. The Court anticipates setting the deadline, taking into account the potential
27 issues presented, for approximately one hundred fifty (150) days from entry of the formal order
28 of appointment. Any deadline established and/or any extension thereof will not signify any

1 implied finding of a basis for tolling during the time period established. Petitioner at all times
2 remains responsible for calculating the running of the federal limitation period and timely
3 presenting claims.

4 IT FURTHER IS ORDERED, so that the respondents may be electronically served with
5 any papers filed through counsel, that the Clerk shall add Attorney General Catherine Cortez
6 Masto as counsel for respondents and shall make informal electronic service of this order
7 upon respondents by directing a notice of electronic filing to her. Respondents' counsel shall
8 enter a notice of appearance within **twenty-one (21) days** of entry of this order, but no further
9 response shall be required from respondents until further order of this Court.

10 IT FURTHER IS ORDERED that petitioner's motion (Dkt. #2) is DENIED without
11 prejudice and that his motion (Dkt. #3) to file additional pages in the original petition is
12 GRANTED.

13 IT FURTHER IS ORDERED that counsel additionally shall send a hard copy of all state
14 court record and related exhibits filed to, for this case, the **Las Vegas Clerk's Office**.

15 The Clerk accordingly shall SEND a copy of this order to the *pro se* petitioner (along
16 with a copy of the papers that he submitted), the Nevada Attorney General, the Federal Public
17 Defender, and the CJA Coordinator for this Division. The Clerk further shall regenerate
18 notices of electronic filing of all prior filings herein to both the Nevada Attorney General and
19 the Federal Public Defender.

20 DATED: January 21, 2014.

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24 ANDREW P. GORDON
25 United States District Judge
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